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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION FOUR

THE PEOPLE, Plaintiff and Respondent, v. HUGO LARA, Defendant and Appellant.	B213661 (Los Angeles County Super. Ct. No. GA069908)

APPEAL from a judgment of the Superior Court of Los Angeles County, Janice C. Croft, Judge. Affirmed.

Liberty Bell Law Group, Lynda Westlund and Wade Skalsky for Defendant and Appellant.

Edmund G. Brown Jr., Attorney General, Dane R. Gillette, Chief Assistant Attorney General, Pamela C. Hamanaka, Assistant Attorney General, Victoria B. Wilson and Erika D. Jackson, Deputy Attorneys General, for Plaintiff and Respondent.

Hugo Lara appeals from his conviction on one count of second degree robbery, with a gun use enhancement. He claims there is insufficient evidence of identity to support the conviction. He also claims the court erred in admitting the testimony of a police detective regarding a telephone conversation she overheard in which appellant said he would surprise the prosecutor with two witnesses, and in instructing the jury that it could consider appellant's late disclosure of witnesses as evidence tending to show his consciousness of guilt. We find no error and affirm the judgment.

FACTUAL AND PROCEDURAL SUMMARY

On Saturday afternoon, May 26, 2007, Juan Gonzalez was in the office of his auto body repair shop with his 13-year-old son, M.G. Gonzalez was paying one of his employees when a man entered the shop dressed all in black, wearing a black ski mask, dark glasses, and gloves. The man grabbed the employee and shoved him out the door. He pointed a gun at Gonzalez and handed him a manila folder with writing on it. Gonzalez started reading it and realized the man wanted money. He removed money from his pocket, and handed it to the man. The man waved the gun around, leading Gonzalez to believe he wanted more money, or wanted Gonzalez to keep reading the note. Gonzalez read the rest of the note, which referred to his wife's place of employment and threatened her safety and the safety of his son and two daughters. Gonzalez stood up, removed money from his other pocket, and handed it to the man. Gonzalez gave him approximately $3,000 in all. The man again waved the gun as if he wanted more money, but Gonzalez told him that was all he had. The man then walked out of the office.

Gonzalez and his son stood at the doorway and watched as the man exited a gate in front of the property. Gonzalez estimated the distance as 150 feet. The man turned right on the sidewalk and removed his ski mask. Gonzalez could see his face, and recognized him as appellant. Gonzalez had seen appellant on several occasions because appellant worked at another auto body repair shop on the same lot. Appellant had been in

Gonzalez's office looking for a job, and also had been there because he suspected Gonzalez had reported his employer for violating city work rules.

Gonzalez called the police, and told the responding officer that appellant was the robber. Appellant was arrested and charged with second degree robbery, with an allegation that he personally used a firearm in the commission of the crime. He was convicted as charged, and sentenced to state prison for a total of 13 years. This is a timely appeal from the judgment of conviction.

DISCUSSION

I

Appellant claims the evidence of identity was insufficient to support the verdict. When reviewing a claim of insufficient evidence, we review the entire record and draw all reasonable inferences in favor of the judgment to determine whether a reasonable trier of fact could have found the essential elements of the crime beyond a reasonable doubt. (*People v. Hughes* (2002) 27 Cal.4th 287, 370.) "An appellate court must accept logical inferences that the jury might have drawn from the evidence even if the court would have concluded otherwise." (*People v. Combs* (2004) 34 Cal.4th 821, 849.)

Juan Gonzalez testified that he recognized the man wearing the ski mask as appellant from the time the man walked into the office. He observed the man moving around the office and recognized him as appellant from "his body structure, his hair at the top, the movements he made. I mean, just recognized him."

Gonzalez testified that after taking Gonzalez's money, appellant left the office and "went around a couple cars in front of the shop he [appellant] worked for." Appellant walked out of the gate of the industrial park and made a right turn onto the sidewalk. This was approximately 150 to 160 feet from Gonzalez's office. As appellant turned onto the sidewalk, Gonzalez saw him remove his ski mask. Gonzalez could see appellant's face when he took off the mask, and was certain it was appellant. After appellant took off his ski mask, "it looked like he dropped something. I don't know what it was if it was sunglasses, money, a gun. I don't know. He dropped something and he

had already taken off his ski mask so he turned around" to pick up what he had dropped. Appellant then continued walking away.

Gonzalez had seen appellant in front of his shop many times before the robbery. Appellant also had come into Gonzalez's shop and threatened him. Gonzalez explained that appellant worked as a painter for another body shop, and that shop did not have a spray booth, as required by local law. "The City came to bother 'em a couple of times. They couldn't paint unless they had a spray booth and I guess he figured that I was calling because it was hurting my business that they were painting and he would come over here and make threats and they would close their place down and I was gonna be getting something." On another occasion, appellant came into Gonzalez's office looking for a job. On that occasion, the two men had a conversation.

When Gonzalez telephoned the police, he said he knew who the robber was. He also told the dispatcher he knew the kind of car he thought appellant drove. He said it was a blue Ford Econoline, maybe a 1978 model. He did not see appellant get into that vehicle on the day of the robbery, but he knew that was the kind of car appellant used to drive. When Officer Hector Hernandez responded to the call, Gonzalez gave him appellant's name as the person who had robbed him. Gonzalez told the officer that appellant took off the ski mask as he exited the front gates of the parking area. Officer Hernandez testified that the location where appellant allegedly removed his mask was visible from the doorway where Gonzalez stood after appellant left the office.

Gonzalez's son, M.G., also recognized appellant when he came into the office on the day of the robbery, even though appellant was wearing a ski mask. Asked what it was about the man that he recognized, M.G. replied, "Just his body structure." He had seen appellant a number of times before the robbery; appellant worked "in the other shops" on the property where his father's business was located. He had seen appellant enough times that he was able to recognize him even with a mask on. M.G. watched as appellant left the office and walked through the property and out to the street. As appellant turned onto the street, he took off his mask, and M.G. saw "the side of his face and his head, his head." After appellant took off his mask, M.G. saw appellant reach

down to the ground to pick something up. M.G. could see appellant clearly; there was nothing in the way.

On cross-examination, M.G. acknowledged that the man who entered the shop had on dark sunglasses and the ski mask, so his eyes were not visible. He did not notice a hole in the top of the ski mask. Asked to explain why he was so certain the man was appellant, M.G. replied, "Just his big body, . . . just his body structure and I had seen him before . . . ." Defense counsel asked him what details in appellant's physical attributes caused M.G. to believe he was the suspect. M.G. replied, "Just like big muscular that kind of like big." Defense counsel asked M.G. how he would be able to differentiate appellant as the suspect from other men with similar build, wearing a mask, dark glasses, gloves and black clothing. M.G. replied, "because I had seen 'em so many times before." Officer Hernandez testified that M.G. had told him he recognized appellant based on his structure and the way he walked and ran.

The jury apparently credited the testimony of these two witnesses, and we will not reweigh the evidence or revisit credibility issues, but rather will presume in favor of the judgment the existence of every fact that could reasonably be deduced from the evidence. (*People v. Ochoa* (1993) 6 Cal.4th 1199, 1206.) Considered in accordance with this standard, the evidence establishes that both eyewitnesses knew appellant before the incident; they recognized him as the perpetrator during the robbery because of his size and build; and they were able to see his face when he removed the ski mask after leaving the office. This is sufficient evidence of identification to support the judgment.

II

Appellant claims the court erred in admitting the testimony of Detective Brenda Iglesias with regard to appellant's side of a telephone conversation which she overheard on the Friday before trial. We find no error.

During trial, appellant indicated he would be calling two witnesses who had not been disclosed on his witness list—Paul and Jimmy Chavarria. The prosecutor objected, and the court recessed proceedings to permit the prosecutor to interview the witnesses before they testified.

Paul Chavarria then testified that he was employed by the victim at the time of the robbery, but previously had worked with appellant at the other body shop. Appellant had telephoned Chavarria two days earlier, on the first day of trial, asking if he was willing to testify. Chavarria testified that on the day of the robbery, he was outside the victim's office waiting to get paid. He saw a person who was dressed in black and wearing a black ski mask run out of the office. The man ran out the gate, turned right, and then disappeared behind a building. Chavarria did not lose sight of the man, and he did not see the man take off the ski mask. Chavarria testified that the man dressed in black was a little shorter and thinner than appellant.

Following Paul Chavarria's testimony, the court conducted an Evidence Code section 402 hearing with regard to Detective Iglesias. The detective testified that on the Friday before trial began, she was in the hallway of the Alhambra courthouse when she overheard appellant talking on a cell phone to an unknown person. He told this person that the trial was probably going to be continued, and that he was sick of the delays. Detective Iglesias heard him say that "' the two ratas they left to Mexico. Sucks for them because now they have an arrest warrant but that's on them.'" The detective explained that the word "rata" was Spanish for rat, and that it is a slang term used to describe a snitch. She then heard appellant say that "they were going to surprise the lawyers" with two witnesses the lawyers would not have a chance to interview.

The prosecutor argued that Detective Iglesias's testimony was relevant to prove that appellant contacted Paul and Jimmy Chavarria to testify in order to surprise the prosecution with their testimony. He also argued that in his telephone conversation, appellant referred to two witnesses as ratas, and said they had gone back to Mexico. The prosecution argued that one of its witnesses had testified that a witness had gone back to Mexico, and the prosecution believed that witness would have corroborated the prosecution's case. Thus, the prosecutor argued that defendant's reference to two witnesses as "ratas" indicated a "consciousness of guilt and an admission that he knows that there is somebody who could testify against him who is no longer available . . . ."

The court allowed the detective to testify to appellant's statement about the surprise witnesses, but not as to the "ratas" who had fled to Mexico.

The court properly considered the detective's testimony relevant, and more probative than prejudicial. (Evid. Code, § 352.) Appellant's telephone statement that he intended to surprise the lawyers by bringing in two witnesses who had not been interviewed, considered with his late disclosure of Paul and Jimmy Chavarria as witnesses, suggests he purposely concealed the witnesses to prevent the prosecution from investigating them. This was relevant and probative with respect to the witnesses' credibility and bias. The court carefully excluded appellant's references to "ratas" and left only the reference to the surprise witnesses. This was not inflammatory, confusing, or time consuming. There was no error in admitting Detective Iglesias's testimony.

III

Appellant argues the court erred in instructing the jury in terms of CALJIC No. 2.28 on his failure to timely disclose witnesses Paul and Jimmy Chavarria. The instruction provided that appellant had not made timely disclosure, but that the court had permitted the undisclosed witnesses to testify. "If you find that the delayed disclosure was by the defendant personally, or was authorized by, or done at the direction and control of the defendant, and relates to a fact of importance, rather than something trivial, and does not relate to subject matter already established by other credible evidence, you may consider the delayed disclosure as evidence tending to show the defendant's consciousness of guilt. However, this conduct is not sufficient by itself to prove guilt, and its weight and significance, if any, are for you to decide."

Appellant had an obligation under Penal Code section 1054.3 to disclose to the prosecuting attorney "[t]he names and addresses of persons, other than the defendant, he or she intends to call as witnesses at trial, together with any relevant written or recorded statements of those persons . . . ." Section 1054.7 provides that this disclosure "shall be made at least 30 days prior to the trial, unless good cause is shown why a disclosure should be denied, restricted, or deferred. . . . If the material and information becomes known to, or comes into the possession of, a party within 30 days of trial, disclosure shall

be made immediately, unless good cause is shown why a disclosure should be denied, restricted, or deferred. 'Good cause' is limited to threats or possible danger to the safety of a victim or witness, possible loss or destruction of evidence, or possible compromise of other investigations by law enforcement." Appellant did not timely disclose these witnesses to the prosecution in accordance with these statutes, nor did he establish good cause why such disclosure could not be made.

Appellant argues the instruction was not warranted because the victim testified at the preliminary hearing that someone named Jimmy Eccheveria and two people named Paul were among his employees waiting to get paid at the time of the robbery. He argues that the prosecution thus had ample notice that these two men were potential witnesses. The names given at the preliminary hearing were similar but not the same as the names of the two witnesses who testified. More importantly, nowhere in section 1054.3 or the other reciprocal discovery statutes is there an exception from the disclosure obligation where the opposing party could have discovered the witnesses by its own investigation.

Appellant's failure to make timely disclosure of the two witnesses, coupled with evidence of a telephone call in which he stated he would present two "surprise" witnesses who could not be interviewed before trial, support the court's instruction.

DISPOSITION

The judgment is affirmed.

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EPSTEIN, P.J.

We concur:

WILLHITE, J. SUZUKAWA, J.